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No. 91-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM H. DENNLER, *et al.*,

Petitioners,

v.

ROBERT S. TRIPPET, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 27A of the Securities Exchange Act of 1934, added by Section 476 of the FDIC Improvement Act of 1991, which renders this Court's decision in *Lampf, Pleva v. Gilbertson*, 111 S.Ct. 2773 (1991), non-retroactive in its application to Section 10(b) claims, requires reversal of the Tenth Circuit's judgment ordering dismissal of petitioners' Section 10(b) claims as time-barred, based on a retroactive application of *Lampf, Pleva*.

2. Whether, for purposes of the one-year limitations period of Section 13 of the Securities Act of 1933, a securities issuer's rescission offer implemented in settlement of an SEC enforcement action operates, as a matter of law, to put investors on notice of a wholly distinct fraudulent scheme perpetrated by the issuer, where (a) the limited violations of law alleged by the SEC have seemingly been cured by the rescission offer prospectus, (b) no other evidence of fraud by the issuer is apparent, and (c) the jury specifically found that such investors could not with reasonable diligence have discovered the fraud until 28 months later.

3. Whether the doctrine of equitable estoppel enunciated by this Court in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), is inapplicable as a matter of law to cases subject to Section 13 of the Securities Act of 1933.

PARTIES TO THE PROCEEDING

Petitioners in this Court are William H. Dennler, John D. Lockton, Peter G. Powers, Peter P. Luce, William D. Robertson, Thomas H. Thorner, William Grohne, Beatrice B. Warren, Joseph C. Bennett, Estate of Hoyt Ammidon, Fred J. Borch, Joseph A. Buda, Estate of Arthur M. Bueche, Estate of Thomas S. Gates, Hubert W. Gouldthorpe, Earl D. Hilburn, Joseph E. Horak, Francis K. McCune, Estate of J. Stanford Smith, and Hicks B. Waldron. The first nine petitioners named petition on their own behalf and as representatives of nine classes of investors certified by the trial court pursuant to Rule 23, Fed. R. Civ. P. Respondents in this Court (defendants-appellants below) are Robert S. Trippet, Frank E. Sims, Elmer M. Kunkel, Wynema A. Cross as Executrix of the Estate of Norman C. Cross, Jr., Cross & Company and Kothe & Eagleton, Inc. All other parties named in the caption of the opinion below (App. 1a-23a) are either defendants who have settled and been dismissed or plaintiffs who were either former class representatives or whose individual claims were dismissed voluntarily before trial.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-50a[1]) is reported at 939 F.2d 1420. The order denying petitioners' petition for rehearing and suggestion for rehearing en banc (App. 51a-55a) is reported at 947 F.2d 897. The order denying petitioners' motion to recall the mandate and for rehearing (App. 56a) is unreported. The order of the district court entered

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[1] App. refers to the separately bound appendix to this petition for a writ of certiorari.

October 17, 1988 rejecting respondents statute of limitations defenses (App. 57a-59a), and the final judgment of the district court entered November 16, 1989 (App. 60a-75a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1991 (App. 1a), and rehearing was denied on October 21, 1991 (App. 51a). By order dated December 30, 1991, Justice White extended the time within which to file a petition for a writ of certiorari to and including February 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution; Sections 11 and 13 of the Securities Act of 1933 ("the 1933 Act"), 15 U.S.C. §§ 77k and 77m; Sections 9(e) and 10(b) of the Securities Exchange Act of 1934 ("the 1934 Act"), 15 U.S.C. §§ 78i(e) and 78j(b); Section 476 of the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236, 2387 (1991); and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, are set out at App. 147a-155a.

STATEMENT

1. From 1964 through 1972, Home-Stake Production Company sold interests in annual oil and gas development programs to numerous investors

throughout the United States.[2] Each annual program was organized as a joint venture between the investors and a newly-created Home-Stake subsidiary (Joint Br., A-3, ¶¶ 69-71).[3] Home-Stake and its officers, particularly its chief executive officer, respondent Trippet, exercised complete control over these subsidiaries (Joint Br., A-3, ¶ 44). Although the subsidiaries nominally organized and operated the programs, they had no employees of their own.

Home-Stake registered with the SEC the interests offered to investors in each annual program (Joint Br., A-3, ¶ 71). The programs were sold pursuant to prospectuses that contained descriptions of mineral properties proposed to be developed, tables showing the purported results of prior programs, and audited financial statements of the offerors (Exs. RD 385-93). In addition, Home-Stake routinely furnished investors with copies of its annual reports, unregistered sales literature setting out projected investment returns, and, beginning in 1967, evaluation reports from purportedly independent petroleum geologists showing values for each annual program well in excess of its purchase price (T. 165-67, 223-25, 250-53, 1422-23; Exs. RD 1-8, RD 49-57, RD 318-83).

Unknown to investors, virtually none of the development work on any Home-Stake program ever took

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[2] Citations to the record below are as follows. A stipulation of undisputed facts among the parties, which was given to the jury, was attached to respondents' joint brief in the court of appeals and is cited as Joint Br., A-3, ¶ ___. The trial transcript is T. ___ and trial exhibits are Ex. ___. Pleadings filed in the district court are cited by docket number as Doc. ___.

[3] The dates and amounts of program interests purchased by the petitioners herein were stipulated. Joint Br., A-3, ¶¶ 1-37.

place (T. 423-32, 464-65, 505-15, 3351-55; Exs. 250, 292, 1254), and every program lost money continuously from its inception through the date of Home-Stake's bankruptcy in September 1973 (T. 1163-71; Exs. K-37A - K-42). Nevertheless, Home-Stake sent investors quarterly checks representing their purported share of profits from oil production, secretly charging those payments to the programs' development budgets (T. 742-48, 837-38, 1165-66, 1170, 1181, 1199). By using development monies to pay investors fictitious profits, Home-Stake in substance operated an elaborate Ponzi scheme in which funds invested in one program were returned either to those investors or to investors in prior programs (T. 1184-86, 1192, 1218).

Home-Stake disclosed none of its scheme to prospective investors, to the SEC or to the IRS (which would have disallowed the intangible drilling cost deductions that Home-Stake falsely advised investors they could claim). Instead, Home-Stake continually furnished its investors with fictitious production reports, bogus descriptions of drilling activities (Exs. RD 62-296; T. 233-38, 624-25, 1417), inflated program valuations (Exs. RD 318-83), and false audited financial statements showing increased income and net worth from mineral development (Exs. RD 48-57; T. 1198-1248). Home-Stake likewise filed fraudulent registration statements annually with the SEC, showing increased payouts of nonexistent oil revenues to investors in prior programs (T. 1171-79, 1242-43).

2. In 1970 the SEC learned that Home-Stake had sold more than the registered number of interests in its 1970 Program and had used, in selling those interests, an unregistered "program book" containing

unsupported income projections and reserve estimates (T. 1442-44, 1513-15). In February 1971, the SEC sued Home-Stake and certain of its officers, including respondents Trippet and Kunkel, its then chief financial officer, alleging violations of the registration and antifraud provisions of the securities laws (Ex. RD 657).[4] Specifically, the SEC challenged (a) the sale of more than the maximum number of 914 registered units in the 1970 Program; (b) unsupported estimates of oil reserves and future income for the 1970 Program in Venezuela; and (c) Home-Stake's failure to comply with an undertaking not to accept payment for units in the 1970 Program until a post-effective prospectus amendment was delivered to investors (*Id.*).

In April 1971, Home-Stake and its co-defendants agreed to settle the SEC suit by making a rescission offer to investors in the 1970 Program. The settlement was embodied in a consent decree whereby defendants agreed (a) to reduce the 1970 Program to its originally registered size; (b) to eliminate income projections for the 1970 Program and provide a reduced reserve estimate prepared by a petroleum engineer acceptable to the SEC; (c) to circulate to investors in the 1970 Program a revised prospectus accurately describing the program and the rescission offer; and (d) not to violate the securities laws in the future (Ex. RD 659). As ordered by the district court, the rescission offer prospectus was mailed to investors on April 30, 1971 (Ex. RD 410). Home-Stake subsequently advised the SEC that enough investors had

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[4] Respondents Cross and Sims were not sued by the SEC and respondents Kothe & Eagleton and Cross & Company had yet to provide any services to Home-Stake as of the SEC suit.

accepted the rescission offer to reduce the 1970 Program to its originally registered size, with more than 600 investors holding $18,280,000 of interests (914 units) electing to continue their investment (Ex. RD 386 at 43, Ex. 450B).

The 1971 SEC suit contained no allegations concerning Home-Stake's 1964-1969 Programs (which were located in California, not Venezuela), no allegations concerning any aspect of the Home-Stake Ponzi scheme, and no allegation of inaccuracies in Home-Stake's audited financial statements (Ex. RD 657). (In part, this was due to false and misleading information that respondents submitted to the SEC during its investigation (T. 1046, 1063-65; Exs. 2618, 2640, 3832).) In any event, the specific wrongs the SEC had alleged—oversales of interests in, and unsupported estimates of income and reserves for, the 1970 Program alone—were purportedly cured by the rescission offer prospectus, which was accepted by the SEC and the district court as satisfying the consent decree (Exs. RD 407, RD 410, RD 659).

Between early November and late December 1971, Home-Stake registered with the SEC and sold to more than 400 investors interests in a new 1971 Program (Ex. RD 386; Ex. 450B). Between early October and late December 1972, Home-Stake registered with the SEC and sold to more than 130 investors interests in its 1972 Program (Ex. RD 385; Schedules Attached To Final Judgment entered November 16, 1989, Vol. 2, 1972 Class). The prospectuses for the 1971-1972 Programs included a brief description of the SEC action, the ensuing consent decree, and the rescission offer for the 1970 Program (Exs. RD 385, RD

386). Neither prospectus disclosed Home-Stake's Ponzi scheme, which continued unabated (*Id.*).

3. On March 30, 1973, three investors (including Ivan Anixter, the original named plaintiff) brought this securities fraud class action against Home-Stake on behalf of investors in the 1965-1971 Programs. (Originally filed in California, the case was later transferred to the United States District Court for the Northern District of Oklahoma.) (App. 25a). In September 1973, the SEC sued Home-Stake and, for the first time, alleged the existence of the Home-Stake Ponzi scheme (N.D. Okla., Case No. 73-C-306, filed 9/11/73). In settlement of that SEC suit, on September 20, 1973, Home-Stake filed for reorganization under the bankruptcy laws (N.D. Okla., Case No. 73-B-922) (T. 3472). In May 1974, the *Anixter* complaint was amended by adding claims on behalf of investors in the 1964 and 1972 Programs, adding plaintiffs to represent those classes, and adding defendants including respondents Kothe & Eagleton, Inc. (securities counsel in the 1971 Program offering) and Cross & Company (auditors of the Home-Stake financial statements included in the 1972 Program prospectus) (Doc. 60).

In 1976, the *Anixter* suit was certified as a class action on behalf of nine separate classes, respectively comprising investors in each of Home-Stake's annual programs from 1964 through 1972. *In re Home-Stake Production Co. Securities Litigation*, 76 F.R.D. 351 (N.D. Okla. 1977). Following a five-week jury trial in the summer of 1988, the jury found respondents liable for violations of Section 11 of the 1933 Act, Section 10(b) of the 1934 Act, and Rule 10b-5 thereunder (App. 60a-75a). The jury also answered two sets of

special interrogatories concerning the statute of limitations. First, the jury found that for each group of claims against each defendant, the applicable class representative did not discover, and with the exercise of reasonable diligence could not have discovered, the factual basis for his or her claim prior to September 1973, when the second SEC lawsuit was filed (App. 78a-146a). Second, the jury found that respondents Trippet, Kunkel and other Home-Stake officers intended to and did thwart the federal courts, the SEC and the IRS in the performance of their official duties (App. 76a-77a).

Based on these jury findings, the district court ruled that the *Anixter* actions were not barred by the applicable statutes of limitations (App. 57a-58a). In the alternative, based in part on the jury's finding that defendants had "intentionally thwarted and defeated the federal courts, the SEC and the IRS in their efforts to administer and enforce the laws of the United States," the court held that "defendants are estopped from raising statute of limitations defenses to the claims asserted against them" (App. 58a-59a).[5] In November 1989, following a three-day jury trial on damages, the district court entered judgments for petitioners and the classes they represent aggregating in excess of $130 million (App. 60a-75a).

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[5] The court made similar findings with respect to common-law negligence claims advanced in individual actions (the "*Anderson* actions") filed in April and May 1974 by those petitioners who are not *Anixter* class members. *See* App. 58a. Since the contentions of the individual petitioners generally track those of the class petitioners, we will, for reasons of simplicity, refer to them collectively as "petitioners."

4. The Tenth Circuit reversed, ruling that petitioners' claims were time-barred and directing the district court to dismiss the case (App. 1a-50a). With regard to petitioners' claims under Section 11 of the 1933 Act, the court ruled (a) that the claims of the 1964-1969 investor classes were barred by the "absolute" three-year statute of limitations contained in Section 13 of the 1933 Act; and (b) that the claims of the 1970-1972 investor classes were barred, "as a matter of law," by the one-year statute of limitations contained in Section 13, because investors in those programs were assertedly placed on "inquiry notice" of their claims in April 1971 by the SEC suit and rescission offer prospectus involving the 1970 Program (App. 32a-47a).

As for petitioners' claims under the 1934 Act, the Tenth Circuit ruled that, under this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991), petitioners' Section 10(b) claims were no longer governed by the applicable Oklahoma statute of limitations (two years from the date petitioners discovered or should have discovered the fraud). Rather, the Tenth Circuit held that *Lampf, Pleva* required petitioners' Section 10(b) claims to be assessed under the uniform federal statute of limitations set forth in Section 13 of the 1933 Act. Applying that Section's three-year and one-year limitations periods, the court of appeals ruled that the Section 10(b) claims of the 1964-1969 and the 1970-1972 investor classes were respectively time-barred (App. 47a-50a).

Supported by the SEC as amicus curiae, petitioners sought rehearing and rehearing en banc. The Tenth Circuit granted rehearing "in order to clarify [its]

prior opinion" in two respects (App. 52a). First, the court amended its discussion of Section 10(b), ruling that petitioners' claims thereunder were barred by the three-year/one-year limitations provisions of Section 9(e) of the 1934 Act, given the "substantial similarity" between Section 9(e) and Section 13 (App. 52a-54a). Second, the court expressly ruled that this Court's decision in *Lampf, Pleva* was to be applied retroactively (App. 54a-55a).

5. On December 19, 1991, the President signed into law the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (1991). Section 476 of that Act, 105 Stat. 2387, adds to the 1934 Act a new Section 27A. It provides in pertinent part that the limitations period for any pending Section 10(b) action commenced on or before June 19, 1991—the day prior to this Court's decision in *Lampf, Pleva*—"shall be the limitation period provided by the laws applicable in the jurisdiction * * * as such laws existed on June 19, 1991" (App. 154a). The stated purpose of Section 27A was to render this Court's decision in *Lampf, Pleva* nonretroactive in its application to Section 10(b) claims. *See* 137 Cong. Rec. H11810-H11813 (daily ed. Nov. 26, 1991) (statements of Congressmen Dingell and Markey); 137 Cong. Rec. S17315 (daily ed. Nov. 21, 1991) (statement of Senator Riegle).

On December 24, 1991, petitioners moved the Tenth Circuit to recall its mandate, grant rehearing to consider the effect of Section 27A, and reinstate their Section 10(b) claims and judgments. On January 6, 1992, the Tenth Circuit denied the motion without briefing, argument or opinion (App. 56a).

REASONS FOR GRANTING THE PETITION

1. Section 27A of the 1934 Act, enacted on December 19, 1991, plainly demands reversal of the Tenth Circuit's judgment in this case. Section 27A governs two categories of litigation. Section 27A(a), entitled "Effect on Pending Causes of Action," provides as follows (App. 154a):

> The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

Section 27A(b), entitled "Effect on Dismissed Causes of Action," covers cases brought on or before June 19, 1991, but "dismissed as time barred subsequent to" that date. It provides that, if such an action would have been filed timely under the principles of Section 27A(a), it "shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section" (App. 154a-155a).

The time to petition this Court for certiorari from the Tenth Circuit's judgment had not expired as of the date Section 27A was enacted, and this case has not yet been dismissed. It is therefore a "pending case" governed by Section 27A(a).[6] The statute of

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[6] Because the period prescribed by Section 27A(b) for moving to reinstate "dismissed causes of action" expires 60 days from the date of enactment, petitioners, in order to prevent any possibility of whipsaw, filed on January 10, 1992, a protective motion in the district court to reinstate their judgments pursuant to Section 27A.

limitations applicable to petitioners' Section 10(b) claims is thus the limitation period applicable under the law of the Tenth Circuit as such law existed the day before *Lampf, Pleva* was decided.

Prior to *Lampf, Pleva*, the limitations period for Section 10(b) claims in the Tenth Circuit was "the appropriate limitations statute of the state in which the alleged violation occurred." *Hackbart v. Holmes*, 675 F.2d 1114, 1120 (10th Cir. 1982). For cases from Oklahoma, such as this one, the Tenth Circuit applied the Oklahoma two-year statute of limitations. *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171 (10th Cir. 1974). Whatever the length of the relevant state statute, the Tenth Circuit held that "the limitations period is tolled until the aggrieved party learns of the fraud or should have discovered it by the exercise of reasonable diligence." *Hackbart*, 675 F.2d at 1120.

The Tenth Circuit reaffirmed these principles shortly before deciding the instant appeal. *See Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817 (10th Cir. 1990). In *Bath*, the Tenth Circuit was invited to abandon reference to state statutes of limitations in Section 10(b) cases, and instead to adopt the federal limitations period first enunciated by the Third Circuit in *In re Data Access Systems Securities Litigation*, 843 F.2d 1537, *cert. denied*, 488 U.S. 849 (1988). In August 1990, less than a year before *Lampf, Pleva*, the Tenth Circuit explicitly declined that invitation. *Bath*, 913 F.2d at 818-819. Thus, the statute of limitations applicable to petitioners' Section 10(b) claims, under Tenth Circuit law as it existed on June 19, 1991, was two years from the date petitioners learned of or should have discovered the fraud perpetrated upon them. By virtue of

Section 27A, that limitations period is now applicable to petitioners' Section 10(b) claims notwithstanding *Lampf, Pleva.*[7]

Under the statute of limitations that Congress has decided shall govern this case, petitioners' Section 10(b) claims were timely filed. At trial, the jury found as a fact that petitioners in the exercise of reasonable diligence could not have discovered their claims against respondents before September 1973 (App. 78a-146a). Counting from that date, the claims of all petitioners against all respondents were timely, the last complaint having been filed on May 24, 1974.

Notwithstanding this jury finding, the Tenth Circuit determined that "the one-year discovery period must begin to run from April 30, 1971," as a result of the SEC enforcement action involving only the 1970 Program and Home-Stake's subsequent rescission offer (App. 47a). Even under that determination—the error of which we demonstrate below, in our discussion of the second question presented—most or all of petitioners' Section 10(b) claims would be timely. Almost without exception, such claims were filed within two years of (i) April 30, 1971, or (ii) the date on which the securities in question were first offered and sold.[8]

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[7] Because the Tenth Circuit, unlike the Second, Third and Seventh Circuits, had not adopted as of June 19, 1991, the three-year/one-year federal limitations period first recognized in *In Re Data Access, supra*, the reference in Section 27A(a) to "principles of retroactivity" has no application here.

[8] The Section 10(b) claims against respondents Trippet, Kunkel and Cross for all investor classes were filed in March 1973. The Section 10(b) claims of the 1972 investor class against respondent

In sum, the Tenth Circuit's decision ordering the dismissal of petitioners' Section 10(b) claims cannot stand in light of Congress' enactment of Section 27A. Its decision should therefore be vacated and the case remanded for reconsideration in light of the new law. The Court may wish to consider summary action.[9]

2. The Tenth Circuit likewise erred in its application of "inquiry notice" principles to bar the claims of investors in the 1970-1972 Programs under Section 11 of the 1933 Act. At trial, the jury specifically found that petitioners, in the exercise of reasonable diligence, could not have discovered the facts underlying Home-Stake's Ponzi scheme prior to September 1973. The Tenth Circuit overturned the jury's finding, rul-

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Cross & Company were filed in May 1974, within two years of the date (November 1972) when interests in the 1972 Program were first offered and sold. The Section 10(b) claims of the 1971 investor class against respondent Kothe & Eagleton (a law firm which had not been involved in any prior Home-Stake securities offering) were filed on May 24, 1974. There is no evidence in the record from which a trier of fact could conclude that a 1971 class member, placed on inquiry notice by a single paragraph in the 1971 Program prospectus describing the earlier SEC action and court-ordered rescission offer involving the 1970 Program, could have discovered, through the exercise of reasonable diligence, either Home-Stake's fraudulent sale of the 1971 Program or Kothe & Eagleton's role in that fraud between November 1971 (when interests in the 1971 Program were sold) and May 24, 1972. *Compare Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979).

[9] Congress enacted Section 27A on the premise that the Court's decision in *Lampf, Pleva* would apply retroactively. Obviously, were the Court to determine that its decision in *Lampf, Pleva* should not be applied retroactively to pending cases, the Tenth Circuit's decision should be reversed on the merits, without regard to Section 27A.

ing, as a matter of law, that petitioners were on "inquiry notice" of the fraud practiced upon them as of April 30, 1971. That was the date on which Home-Stake's rescission offer prospectus, disclosing the first SEC suit and subsequent consent decree, was mailed to investors in the 1970 Program.[10] According to the Tenth Circuit, the SEC complaint and rescission remedy represented " 'great glowering clouds' * * * sufficient to put plaintiffs on notice that something was amiss" (App. 43a). "However incomplete that notice might have been," the court ruled, "it encompassed enough of a 'storm warning' to start the clock as a matter of law" (App. 47a). The court accordingly held that the Section 11 claims of the 1970-1972 Program investors, filed on March 30, 1973, were time-barred by the one-year limitations period of Section 13.[11]

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[10] A literal application of the Tenth Circuit's holding to the 1971 and 1972 investor classes would result in the former being deemed to have "inquiry notice" of Home-Stake's fraud six months before they bought their securities, and in the latter being *time-barred* before they made their initial investments.

[11] The Tenth Circuit initially ruled that these investors' Section 10(b) claims, as well their Section 11 claims, were controlled by Section 13 and time-barred for that reason. On rehearing, petitioners and the SEC pointed out that Section 9(e) of the 1934 Act governs Section 10(b) claims (*see Lampf, Pleva*, 111 S.Ct. at 2782 n.9), and that Section 9(e)'s one-year statute is triggered by the date of actual discovery, not (as under Section 13) by the date a violation should have been discovered by the exercise of reasonable diligence. The Tenth Circuit on rehearing then "clarified" its original opinion and held that, notwithstanding Congress's deliberate omission of "reasonable diligence" language from Section 9(e), the two Sections should be construed identically; this holding was based on the Tenth Circuit's belief that *Lampf, Pleva* (which did not discuss this issue) mandates a uniform standard (App. 52a-54a). While the Tenth Circuit's

The court of appeals plainly erred in ignoring the express findings of the jury and the district court and substituting its own view of the inferences to be drawn from the SEC enforcement action. The February 1971 SEC suit related solely to the offering and sale of units in Home-Stake's 1970 Program. That suit contained no allegations about Home-Stake's 1964-1969 Programs, no allegations about Home-Stake's 1971-1972 Programs (which did not yet exist), and no allegations about any aspect of the Ponzi scheme that forms the basis of petitioners' case.[12] The SEC action was settled by Home-Stake's circulation of a rescission offer prospectus which to all appearances cured the limited violations—oversales of units in, and overestimates of reserves and income from, the 1970 Program—of which the SEC had complained.

In determining that the 1971 SEC litigation put investors on notice of the wholly distinct fraud alleged here, the Tenth Circuit in effect holds that once an investor learns that the SEC has compelled an issuer to correct a securities law violation, that investor is on notice, as a matter of law, that any subsequent securities offering by that or any related issuer may

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decision on this point is erroneous and will serve as a pernicious precedent for Section 10(b) cases filed after June 19, 1991. Congress's enactment of Section 27A, discussed above, moots the Section 9(e) issue in this case.

[12] Indeed, respondents Kothe & Eagleton and Cross & Company had not been retained by Home-Stake nor had they performed any services for any Home-Stake company at the time of the SEC suit. While respondent Norman Cross was the auditor for Home-Stake in connection with its 1969 and 1970 programs, he was not implicated in the 1971 SEC suit. Cross did, however, provide false audited financial statements which were included in the rescission offer prospectus.

well be fraudulent. According to the Tenth Circuit, a securities law violation is a sort of original sin that taints an issuer's securities indefinitely. Any investor contemplating the purchase of a subsequent issue has only one year to investigate the possibility of fraud in connection with such later offering, even if the issuer has corrected its prior violation to the satisfaction of the SEC and the courts and there are no other facts suggesting fraud in the subsequent offering.

This holding flies in the face of common sense, subverts the policies of the federal securities laws, and improperly invades the province of the jury. In settling the 1971 SEC suit, Home-Stake agreed to correct all violations alleged by the SEC and to abide by a court injunction against future violations, breach of which was punishable by criminal contempt. Confronted with these facts, a rational investor could reasonably infer that Home-Stake's wrongdoing had been identified and cured. Indeed, more than 600 investors in the 1970 Program declined Home-Stake's rescission offer, and more than 500 persons subsequently opted to invest in its 1971-1972 Programs. And even if an investor could plausibly have read the SEC and court-approved rescission offer prospectus as the work of a chronic, rather than a repentant, sinner, the Tenth Circuit wholly failed to explain why that inference was so compelling that it was, as a matter of law, the *only* inference a trier of fact could permissibly draw.

The practical effects of the Tenth Circuit's decision will seriously compromise the policies of the federal securities laws. Any investor who purchases securities from an issuer that previously signed an SEC consent

decree will be deemed on "inquiry notice" of fraud from the moment of his purchase, leaving him just 12 months to investigate the possibility of fraud and bring suit if fraud is discovered. The virtual impossibility of an investor's meeting this deadline is shown by the record of this case. Following the April 1971 consent decree, it took the SEC, which has broad subpoena powers and a large staff of trained investigators, approximately $2^1/_2$ years to discover Home-Stake's Ponzi scheme and challenge it in court.

Given the unreasonableness of the Tenth Circuit's discovery deadline, investors will have strong incentives to avoid securities of issuers who have previously been the subject of SEC enforcement actions. The decision will thus impede free access to the capital markets by investors and issuers alike. To avoid jeopardizing their future securities offerings, issuers will have strong incentives not to settle cases with the SEC, conscious that a consent decree can become an indelible badge of fraud. And the practical consequences of the Tenth Circuit's holding, as the SEC explained in urging rehearing below, are even more unfortunate where the issuer is dishonest: "[T]he panel's holding, perversely and ironically, allows persons who have previously violated the securities laws and do so again to take advantage of a shorter statute of limitations than first-time wrongdoers" (SEC Amicus Br. 5 (filed Aug. 27, 1991)).

In holding that an SEC action puts investors on inquiry notice, as a matter of law, of unrelated frauds not alleged by the SEC, the decision below conflicts with the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979). An investor there sued accountants in July 1977 for

falsely certifying an issuer's financial statements. The accountants raised in defense the applicable state two-year statute of limitations, contending that the investor was put on inquiry notice in June 1974, w' en the SEC brought market manipulation charges ag inst the underwriters of the issuer's securities (609 F.2d at 588-589). The Second Circuit reversed the district court's dismissal of the complaint, holding that, because of conflicting inferences that could be drawn from these undisputed facts, summary judgment on the statute-of-limitations issue was improper (*id.* at 592-593). In so holding, the court emphasized that the SEC's June 1974 order had alleged no fraud by the accounting firm and that "it was not until 1976 that the SEC was able to name these accountants as participants in the fraud" (*id.* at 592). In direct conflict with the Tenth Circuit's holding here, the Second Circuit stated (*ibid.*):

> If the SEC with its commendable expertise and specialized investigative teams was unable to discover the complicity of these accountants until shortly before its Opinion and Order of September 1, 1976 was released, it cannot be said as a matter of law that appellant should have discovered their participation any earlier.

The Tenth Circuit's decision also conflicts with well-established principles governing appellate review of jury verdicts in securities law cases. The issue of when an investor should discover, in the exercise of reasonable diligence, a misstatement or omission in a securities offering, is generally a question of fact for the jury. *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir.), *cert. denied*, 469 U.S.

932 (1984); *Robertson, supra*, 609 F.2d at 592-593. A court of appeals is barred by the Seventh Amendment from redetermining facts found by a jury. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-359 (1962). It is for the jury to judge the credibility of witnesses, weigh conflicting evidence, draw reasonable inferences from undisputed facts, and arrive at a conclusion. *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944).

Here the jurors saw the SEC's 1971 complaint, the ensuing consent decree, and Home-Stake's rescission offer prospectus. The jurors heard testimony from the 1970-1972 class representatives concerning their understanding of those events. And the jurors heard arguments from respondents' counsel urging the jury to draw the very inferences that the Tenth Circuit ultimately drew. The jury, however, found in answers to special interrogatories that the 1970-1972 class representatives neither discovered nor should have discovered the fraud in question until September 1973.[13]

For the Tenth Circuit to overturn this finding and resolve the notice issue as a matter of law was a usurpation of the jury's constitutional role as finder of the facts. This Court has repeatedly recognized that "the drawing of legitimate inferences from the facts are jury functions." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *Accord Lavender v. Kurn*, 327 U.S. 645, 652-653 (1946).[14] And both the

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[13] Respondents below challenged neither the jury instructions concerning the statute of limitations nor the form of the special jury interrogatories.

[14] This Court has held that an appellate court must defer to the factfinder's role in drawing inferences from evidence even

Second and the Ninth Circuits have specifically held that the question whether a plaintiff has exercised reasonable diligence in discovering fraud for statute of limitations purposes, where conflicting inferences may be drawn from otherwise undisputed facts, is a fact question to be decided by the jury. *Robertson v. Seidman & Seidman*, *supra*, 609 F.2d at 592-593; *Mosesian v. Peat, Marwick, Mitchell & Co.*, *supra*, 727 F.2d at 879. *Compare Byers v. Burleson*, 713 F.2d 856, 861-862 (D.C. Cir. 1983) (application of discovery rule in medical malpractice case).[15]

3. The Tenth Circuit also erred in its holding concerning equitable estoppel. In considering the timeliness of the Section 11 claims of the 1964-1969 investor classes, the court of appeals held that the doctrine of equitable estoppel, applied by the district court to bar respondents' reliance on the statute of limitations, "is not available to avoid the statute of repose established by Section 13" (App. 38a). The Tenth Circuit characterized Section 13 as erecting an

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where the inference is drawn by the district court, whose determinations are subject to the more lenient "clearly erroneous" standard of review. *Anderson v. City of Bessemer*, 470 U.S. 564, 573-574 (1985).

[15] The cases that the Tenth Circuit cites to support its result involve situations where the plaintiffs at an early date had knowledge of substantially the same facts upon which they later based their claims. *See Kennedy v. Josephthal & Co.*, 814 F.2d 798 (1st Cir. 1987); *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 694 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981); *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978). Here, by contrast, the 1971 SEC action and ensuing consent decree were entirely distinct from the fraudulent scheme that was the basis for the judgments overturned by the Tenth Circuit.

"absolute bar" to Section 11 claims brought more than three years after the purchase of securities, citing dictum to this effect in *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 2887 (1991).[16]

In so holding, the Tenth Circuit refused to recognize the distinction, articulated in decisions of this Court and others, between equitable *tolling* and equitable *estoppel*. Equitable tolling is a doctrine which holds that "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the [limitations] statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1875). *See also Holmberg v. Armbrecht*, 327 U.S. 392, 396-397 (1946). Because the one-year period of Section 9(e) of the 1934 Act is based on discovery of the facts constituting the fraud, this Court held in *Lampf, Pleva* that the three-year period of Section 9(e) is "a period of repose inconsistent with tolling" (111 S.Ct. at 2782). By a parity of reasoning, that conclusion also applies to Section 13 of the 1933 Act.

In contrast, equitable *estoppel* operates to prevent a defendant from raising an otherwise dispositive statute-of-limitations defense because of his inequitable conduct after the initial tort. *See* Bloomenthal,

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[16] The Tenth Circuit made the same ruling with respect to the Section 10(b) claims of the 1964-1969 classes on the basis of the three-year limitations period of Section 9(e) of the 1934 Act. App. 47a-50a.

The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude, 60 U. Colo. L. Rev. 235, 291-292 (1989). This Court applied the doctrine in an FELA case to estop a defendant from relying on a three-year statute of limitations, noting that the defendant had fraudulently induced the plaintiff not to sue within the time prescribed by law. *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959). The Court explained that equitable estoppel springs from "the maxim that no man may take advantage of his own wrong," a "deeply rooted" principle that "has frequently been employed to bar inequitable reliance on statutes of limitations" (395 U.S. at 232-233).

Addressing the three-year limitations period at issue here, Professor Bloomenthal has explained that

> Equitable estoppel, properly understood, is not inconsistent with the fact that Congress intended the periods of limitation to be absolute. The Congress was attempting to assure directors and others that, after a period of time, no action would be brought against them for allegedly false statements made in a registration statement or otherwise in connection with the sale or purchase of a security. Congress was not saying that by their own subsequent conduct they could not, in effect, extend the period of limitation. It is critical, however, to the application of such doctrine that it be some act other than the events that constitute the basis for the claim that reasonably caused the plaintiff to forbear from asserting his claim.

Bloomenthal, *supra*, 60 U. Colo. L. Rev. at 292.

Thus, in interpreting the Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. § 1711, which contains a three-year statute of limitations substantially identical to that of Section 13, the Seventh Circuit applied *Glus* to hold that a defendant could be equitably estopped from relying on a limitations defense, notwithstanding that equitable tolling was unavailable. *Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978). And the Second Circuit applied equitable estoppel to prevent a defendant from relying on Section 13's requirement that a Section 12(1) action be brought within one year after the underlying violation was committed. *Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1054-1055 (2d Cir. 1969).[17]

In this case, respondents committed numerous independent fraudulent acts over the nine years from 1965 to 1973 to prevent both petitioners and the members of the investor classes they represent, as well as the SEC, the IRS and the federal courts, from discovering the initial fraud in the sale of the Home-

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[17] Equitable estoppel has been applied by the courts of appeals, in a variety of contexts, to prevent defendants from enjoying the benefit of the running of a statute of limitations procured by fraud. *E.g.*, *Cange v. Stotler & Co.*, 826 F.2d 581, 587 (7th Cir. 1987) (Commodity Exchange Act); *United States v. Fidelity & Deposit Co.*, 813 F.2d 697, 700 (5th Cir. 1987) (Miller Act); *Darms v. McCulloch Oil Corp.*, 720 F.2d 490, 494 (8th Cir. 1983) (ILSFDA); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1370 (6th Cir. 1975) (ADEA); *Burke v. Gateway Clipper, Inc.*, 441 F.2d 946, 948 (3d Cir. 1971) (Jones Act); *United States v. Prince-McNemar Construction Corp.*, 320 F.2d 663, 665-666 (9th Cir. 1963) (Miller Act); *Scarborough v. Atlantic Coast Line R.R.*, 178 F.2d 253, 258 (4th Cir. 1949), *cert. denied*, 339 U.S. 919 (1950) (FELA).

Stake 1964 through 1969 Programs. For example, respondent Trippet personally directed the making of Ponzi payments by Home-Stake every quarter through February of 1973 to conceal the absence of program development and the lack of profitable operations (T. 742-46, 837-38). Trippet and respondent Sims authored the fictitious program operations reports mailed monthly or quarterly to investors (T. 233-38, 624-25, 1416-20). Trippet also orchestrated the annual preparation and distribution to investors of fraudulent valuation reports on the 1964 through 1969 Programs (T. 1421-25) and, over the years, authored literally hundreds of letters to class members providing false answers to questions raised by them concerning program distributions and operations (*E.g.*, Exs. 179, 911, 1731, 3182, 3386, 5052). Respondents Kunkel and Cross participated in the preparation and dissemination to 1964 through 1969 investors of fraudulent financial statements contained in Home-Stake's annual reports from 1964 through 1972 (Exs. RD 48-57).

In addition, from 1964 through 1972, each successive program registration statement was submitted to the SEC with false and misleading information about Home-Stake and its prior programs (*E.g.*, Exs. RD 394-430). Moreover, equally false annual reports on Form 10-K for each program were likewise filed with the SEC for each year (Exs. RD 485-504). Respondents Trippet, Sims, Kunkel and Cross either signed those fraudulent filings or audited false financial statements contained therein.[18] Finally, in con-

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[18] During the 1970-71 SEC investigation of Home-Stake, respondent Kunkel testified falsely under oath to the SEC about a purportedly independent equipment supplier (which was in fact

nection with the 1970 Program rescission offer, respondents Trippet, Sims, Kunkel and Cross misled investors, the SEC and the federal district court in 1971 by preparing and disseminating the fraudulent rescission offer prospectus (which included false Home-Stake financial statements) in blatant violation of the consent decree thereby continuing the concealment from all parties of the Home-Stake Ponzi scheme.[19]

Based on this conduct, the jury answered special interrogatories finding that Home-Stake and its officers (including respondents Trippet and Kunkel), intentionally prevented the SEC, the IRS, and the federal courts from discovering the fraudulent sales of securities of which petitioners complain (App. 76a-77a). The trial court concurred and ruled that defendants were equitably estopped from raising statute of limitations defenses to petitioners' Section 11 and Section 10(b) claims (App. 58a-59a). The Tenth Circuit did not dispute that the evidence of defendants' fraudulent post-sale conduct summarized above and the jury's findings based thereon laid the factual predicate for the district court's invocation of equitable estoppel. Rather, the court held the doctrine inapplicable as a matter of law, asserting that its invocation here would "operate[ ] to trump a clear outer limit intended by Congress" (App. 38a). Yet as

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a sham corporation organized by Trippet to defraud investors and the IRS) (Ex. 2618) and made false written representations to the SEC about the value of Home-Stake's major asset (a worthless multi-million dollar receivable) (Ex. 2640).

[19] Three years earlier, Trippet had secretly settled a securities fraud class action in violation of Rule 23(e), Fed. R. Civ. P. (App. 26a n.2).

Professor Bloomenthal has pointed out, "the legislative history [of the 1933 Act] makes it clear that Congress intended the absolute bar to relate to the fraud itself and not to subsequent steps to conceal it." Bloomenthal, *supra*, 60 U. Colo. L. Rev. at 294.[20]

In sum, the Tenth Circuit has interpreted Section 13 to bar the application of equitable estoppel principles in a manner that conflicts both with this Court's decision in *Glus* and with the decisions of other circuits interpreting statutes of limitation having comparable language and purpose. In effect, the Tenth Circuit has turned an ancient adage on its head and adopted the principle that, for cases under Section 13, two wrongs make a right for defendants. Certiorari should be granted to correct the court of appeals' error which, if allowed to stand, would unjustifiably reward securities law violators for their

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[20] The policy of "repose" weighted so heavily by the Tenth Circuit is no more important than the policy of "finality of judgments." Yet this Court has held that the finality of a judgment must give way to the equitable power of a court to prevent a party from taking advantage of fraud. Thus, in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-246 (1944), the Court used its equity power to vacate a final judgment for patent infringement procured by a party through "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." Accord, *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 15 (1972). Application of this equitable power, moreover, is not confined to situations involving fraud on the courts. *See Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 650 F.2d 9, 13 (2d Cir. 1981) (vacating administrative decisions procured by fraud on agency); *Toscano v. Commissioner*, 441 F.2d 930 (9th Cir. 1971) (sanctioning fraud on the IRS and the Tax Court); *United Business Communications, Inc. v. Racal-Milgo, Inc.*, 591 F. Supp. 1172, 1187-1188 (D. Kan. 1984) (vacating prior judgment).

success in concealing from investors and government agencies their fraudulent sales of securities.

CONCLUSION

The petition for writ of certiorari should be granted.

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